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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MICHELE DRAPER, MERIWETHER
LEWIS GARING, JR., JOHN VALENTON,
ROBERT ERSKINE, FLORA YU,
JONATHAN D. SINGLETON and QUINN
RANSON,

Plaintiffs,

vs.

AMERICAN DIAGNOSTIC MEDICINE,
INC., an Illinois Corporation, SAM
KANCHERLAPALLI, VICKY
KANCHERLAPALLI, JAN
HAUSSENBAUER and DOES 4 through 50,

Defendants.

CASE NO. C 09-02753 (VRW)

**NOTICE OF MOTION AND MOTION
TO DISQUALIFY DEFENSE COUNSEL;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT;
COUNSEL DECLARATION (WITH
EXHIBITS)**

**Date: June 3, 2010
Time: 10:00 a.m.
Crtn: 6**

TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN THAT on June 3, 2010 at 10:00 a.m., or as soon
thereafter as counsel may be heard by the above-titled Court, located at 450 Golden Gate
Avenue, 17th Floor, Courtroom 6, San Francisco, California, plaintiff MICHELE DRAPER
will, and HEREBY DOES MOVE, the Court to disqualify attorneys Todd Brian Scherwin,

1 Timothy Joseph Murphy and Shadie Latae Berenji, as well as the law firm of Fisher & Phillips
 2 LLP, from continuing to appear on behalf of or to represent defendants in the above-captioned
 3 action or, in the alternative, for such other relief as this Court deems just, including issue
 4 preclusion, protective orders or other sanctions.

5 This motion is made on the ground that the aforementioned attorneys and law firm came
 6 into possession of attorney-client privileged material, including communications between
 7 plaintiff and her attorney on the subject of this lawsuit, through the extraction of embedded data
 8 from a laptop containing information pertaining to a personal email account, that they failed to
 9 notify plaintiffs' counsel of their possession of these documents for some eight months and
 10 even then it was only when plaintiffs' counsel discovered it, and that they have obstructed and
 11 failed to cooperate with plaintiffs' attempts to determine the extent to which the privileged
 12 documents were used. The possession, knowledge, and actual or potential use of the
 13 information contained in these communications by defendants and their counsel have
 14 irremediably prejudiced plaintiff in the conduct of her case, such that disqualification of counsel
 15 is the signal appropriate remedy.

16 In the alternative, plaintiff requests issue preclusion or entry of protective orders or such
 17 other sanction as the Court deems just under the circumstances. Should the Court deem it
 18 necessary to test the facts in more detail, plaintiff requests an evidentiary hearing before a
 19 United States Magistrate Judge to determine the particulars of when, where and how defendants
 20 and their counsel obtained, reviewed and used the documents in question.

21
 22 DATED: April 26, 2010

PHILLIPS, ERLEWINE & GIVEN LLP

23
 24
 25 By: _____/S/
 26 David M. Given
 27 Attorneys for Plaintiffs
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION AND STATEMENT OF FACTS**

3 This is an action by seven current and former employees of defendants for wage and
4 hour violations under federal and state statutory law. *See* Second Amended Complaint (Docket
5 No. 31). Significant damages flow from defendants' pattern and practice of withholding
6 payment of earned overtime compensation and requiring its employees to work 10-12 hour days
7 – or more – without required meal or rest periods. *See* Joint Case Management Statement
8 (Docket No. 20). Plaintiffs also have additional claims for unfair competition, unjust
9 enrichment, wrongful termination, and related causes of action, all under state law.

10 On April 6, 2009, defendant ADM fired plaintiff MICHELE DRAPER. Plaintiffs filed
11 their Complaint May 8, 2009 in state court; ADM removed it to this Court on diversity grounds.
12 *See* Notice of Removal (Docket No. 1). At or around that time, defendants' counsel demanded
13 that DRAPER turn over certain company property including her company supplied laptop
14 computer. DRAPER complied with the request and on or about May 13, 2009 her counsel
15 voluntarily turned the computer over to defendants. Declaration of Nicholas A. Carlin
16 ("Counsel Decl."), ¶3, Ex. A.

17 As plaintiff later learned, defendants immediately turned the computer over to an outside
18 forensic expert to examine and extract data from it. This expert proceeded to extract personal
19 and confidential data from plaintiff's laptop, including attorney-client communications between
20 plaintiff and her counsel on various subjects related to this case. Counsel Decl., ¶¶12, 14, Exs.
21 D, F.

22 Plaintiff conducted these communications via a personal web-based email account
23 maintained at Yahoo! *See* Counsel Decl., ¶8. As a web-based email account, no client program
24 (such as Outlook) resided on the laptop, and most people would not be aware that emails they
25 had viewed on such an account could be saved on the computer. As later recounted by defense
26 counsel, the effort by defendants' forensic expert to mine this data included retrieval and
27 reconstruction of certain temporary or cached files showing "internet history logs, evidence of
28 communications[,], job searches, and names of files that had been permanently deleted by

1 [plaintiff]” residing on the computer’s hard drive. The data mined in this fashion – which would
2 likely have required specialized software to extract – was subsequently turned over to
3 defendants and their counsel. Counsel Decl., ¶14, Ex. F.

4 The only reason plaintiff is aware of any of the foregoing is because the documents were
5 eventually produced by defendants. The timing and nature of the production of these documents
6 is highly suspicious, however. The documents were printed out on June 24, 2009. *See* Counsel
7 Decl., ¶7. According to defense counsel, these documents were kept in a separate file at the law
8 office of Fisher & Phillips LLP for approximately six months before their production to
9 plaintiff. Counsel Decl., ¶14, Ex. F.

10 Defendants made their initial disclosures on October 16, 2009, but did not include these
11 documents in that disclosure. Defendants made a supplemental disclosure of documents on
12 November 9, 2009, but again did not turn over the laptop documents. Defendants finally
13 produced the laptop documents along with some 14,000 pages of other documents in a massive
14 production on December 16, 2009 (received by plaintiffs’ counsel on December 17, 2009). This
15 was at the height of the holiday season and only three business days before DRAPER’s
16 deposition on December 22, 2009. *See* Counsel Decl., ¶¶4–6.

17 All of the laptop documents were reviewed and Bates-stamped “ADM” by defendants.
18 The documents produced by defendants from the laptop totaled approximately 275 pages.
19 Counsel Decl., ¶7. To avoid publishing them in the public record of this case, plaintiff has
20 created a log of the attorney-client communications. Counsel Decl., ¶10, Ex. B.

21 At DRAPER’s deposition, defense counsel used at least some of the 275 pages of
22 documents recovered from the laptop, querying her on, and often quoting from, the documents.
23 For example, defense counsel queried plaintiff about the circumstances of her termination from
24 defendant(s), asking whether the termination was by “mutual agreement,” a term that came
25 directly from one of the emails extracted from the laptop. By way of further example, defense
26 counsel queried plaintiff about the number of people under her supervision, citing facts and
27 circumstances recounted by plaintiff in emails extracted from the laptop. Counsel Decl., ¶18,
28 Ex. J.

1 It was only later, after plaintiffs' counsel had had a chance to fully review the December
2 16, 2009 document production, that he realized that many of the documents were privileged
3 communications and was able to determine what had happened. Counsel Decl., ¶¶7–9. On
4 February 17, 2010, plaintiffs' counsel wrote a letter demanding "full disclosure" of the
5 circumstances of defense counsel's possession and use of these documents, together with certain
6 remedial action. Counsel Decl., ¶11, Ex. C.

7 In a faxed letter response the same day, defense counsel stated falsely that the documents
8 in question had been "printed, bates labeled by my office's staff and produced with our initial
9 disclosures in October." Counsel Decl., ¶12, Ex. D. After plaintiff's counsel pointed out that
10 the documents had not been produced until December 16, 2009 (Counsel Decl., ¶13, Ex. E),
11 defense counsel responded by letter on March 3, 2010, admitting that the documents were
12 produced on December 16th, but misleadingly suggesting that the reason for the delay was
13 because the parties' stipulated protective order was not entered until December 15, 2009.
14 Counsel Decl., ¶14, Ex. F. While it is true that the protective order was entered on that date,
15 there is no legitimate basis upon which plaintiff's personal emails could be claimed as
16 confidential by defendants.

17 Defense counsel also claimed in this letter that "no documents relating to any
18 communications between Ms. Draper and you and/or any other attorney were reviewed in
19 preparation for Ms. Draper's depositions." But this position is not credible. While it is not yet
20 clear to what extent any of defense counsel's questions were specifically based upon the
21 privileged emails, it is not tenable to claim that defense counsel did not review those documents
22 in preparation for the deposition. Typically, documents of this nature are the first place counsel
23 will look to try to find incriminating evidence, and 275 pages of documents is a relatively small
24 number of documents to review. At least 15 of these were obviously privileged. Moreover,
25 defense counsel clearly used some of the other non-privileged laptop documents in the
26 deposition, for example ADM 2002. This was only 8 documents away from ADM 1994, which
27 was one of the privileged emails. Counsel Decl., ¶10, Ex. B.

1 This exchange was shortly followed by targeted discovery on the subject – one set of six
 2 interrogatories and one set of six document requests. Counsel Decl., ¶15.

3 Notwithstanding these requests, plaintiff has been met with a stonewall. Defense
 4 counsel has failed and refused to identify those individuals at the firm who had access to these
 5 documents or who otherwise reviewed, studied or analyzed the privileged documents – although
 6 counsel acknowledges that within weeks of receipt of the laptop, at least one attorney had
 7 “preliminarily reviewed” certain “spreadsheet data” derived from the laptop, and that the
 8 privileged documents were thereafter stored with other documents derived from the laptop in a
 9 separately-designated file.

10 The discovery responses, which arrived more recently, contain a slew of rote, boilerplate
 11 objections. Among other things, defense counsel was unwilling to identify or produce a
 12 complete set of the documents extracted from the laptop, identify who had access or knowledge
 13 of those documents, or say whether there were communications at defense counsel’s law firm or
 14 with the forensic expert about the documents or plaintiff’s privileged communications. Counsel
 15 Decl., ¶15, Ex. G.

16 Defense counsel has failed to offer any remedial steps. Defense counsel has not
 17 accepted service or otherwise aided in locating the forensic expert hired by their clients, who has
 18 thus far successfully evaded service of a subpoena on him. Counsel Decl., ¶¶16, 17, Ex. H, I.
 19 No agreement has been reached on these subjects despite the meet and confer dialogue. Given
 20 the nature of the documents defendants and their counsel now have in their possession, the case
 21 cannot continue in the present manner without severely prejudicing plaintiff. Counsel Decl.,
 22 ¶19.

23 **II. ARGUMENT**

24 In a diversity case, the subject of privilege is determined under the state law that
 25 otherwise governs. Fed. R. Evid. 501; *Star Editorial, Inc. v. District Court*, 7 F. 3d 856, 859
 26 (9th Cir. 1993). Under California law, applicable here, the documents in question are obviously
 27 and absolutely privileged attorney-client communications: They consist of emails between
 28 plaintiff and the attorney representing her in this case; the emails were sent and received at or

1 around the time this case was commenced; and these emails reference and discuss the facts and
2 circumstances of this case. *See* California Evidence Code §952 (“‘confidential communication
3 between client and lawyer’ means information transmitted between a client and his or her lawyer
4 in the course of that relationship and in confidence”); *Roberts v. City of Palmdale*, 5 Cal. 4th
5 363, 371 (1993) (“The attorney-client privilege applies to communications in the course of
6 professional employment that are intended to be confidential.”).

7 In the case of inadvertent disclosure of privileged information, federal and state law are
8 in accord. Examining or using obviously privileged documents belonging to an adverse party
9 constitutes an ethical violation and subjects the party and its attorney to sanctions or
10 disqualification (or both). *Gomez v. Vernon*, 255 F. 3d 1118, 1133-34 (9th Cir. 2001) (applying
11 federal law; invoking inherent power of court to sanction); *State Comp. Ins. Fund v. WPS, Inc.*,
12 70 Cal. App. 4th 644, 652-54 (1999) (applying California law).

13 Importantly, as shown in the attorney correspondence on the subject, defendants took
14 extraordinary measures to recover the documents in question – employing and, presumably,
15 paying for an outside forensic computer expert to mine data that (as defense counsel admits)
16 were not readily obtainable from the laptop. In short, by necessity, defendants had to
17 intentionally seek out and acquire the inadvertently disclosed information in question.

18 Moreover, the documents were Bates-stamped and produced by defendants as part of
19 their supplemental initial disclosure in this case. Under FRCP 26(a)(1), an initial disclosure is a
20 party’s representation to the other side of those documents in the disclosing party’s “possession,
21 custody, or control” that the party “may use to support its claims or defenses.” Thus, while the
22 precise nature and scope of defense counsel’s review of these documents may remain in
23 question – given the responses received thus far to plaintiff’s discovery on the subject
24 (including, ironically, the assertion of privilege) – whether defense counsel actually reviewed
25 the documents (and intended to rely upon them in the defense of this case) is not.

26 *Rico v. Mitsubishi Motors Corp.*, 42 Cal. 4th 807 (2007), is the controlling case in
27 California on the subject. *Rico* reaffirmed the California standard for the protection of
28

1 privileged information articulated in *State Comp. Ins. Fund v. WPS, Inc.*, *supra*, 70 Cal. App.
2 4th at 656-57.

3 In *Rico*, plaintiff acquired defense counsel's notes of a meeting with two designated
4 defense experts to discuss litigation strategy. While the circumstances surrounding how plaintiff
5 acquired these notes were in question (requiring an evidentiary hearing that ultimately
6 concluded that, unlike here, it was through inadvertence), plaintiff's counsel had reviewed the
7 document. Indeed, in a fashion similar to that here, defense counsel learned that plaintiff had
8 acquired the notes when his counsel used them at a deposition.

9 On motion, the trial court disqualified plaintiff's counsel; the appellate court affirmed.
10 On review, the California Supreme Court considered the "ethical duty [plaintiff's counsel] owed
11 once he received" the privileged documents. The Supreme Court adopted the following rule:

12 When a lawyer who receives materials that obviously appear to be subject to an attorney-
13 client privilege or otherwise clearly appear to be confidential and privileged and where it
14 is reasonably apparent that the materials were provided or made available through
15 inadvertence, the lawyer receiving such materials should refrain from examining the
16 materials any more than is essential to ascertain if the materials are privileged, and shall
17 immediately notify the sender that he or she possesses material that appears to be
18 privileged. The parties may then proceed to resolve the situation by agreement or may
19 resort to the court for guidance with the benefit of protective orders and other judicial
20 intervention as may be justified.

21 *Rico*, *supra*, 42 Cal. 4th at 817.

22 The Supreme Court found that plaintiff's counsel's "admissions and subsequent conduct
23 clearly demonstrate that he violated [this] rule" and that "the trial court did not
24 abuse its discretion by ordering disqualification [of counsel] for violation of [this] rule." *Id.* at
25 819. In *Rico*, the evidentiary record included a hearing on the matter, ordered by the trial court.
26 To the extent necessary and appropriate, plaintiff requests an evidentiary hearing on the matter
27 here before a Magistrate Judge.

28 Nonetheless, the direct evidence, consisting of admissions and conduct of defense
counsel known thus far to plaintiff, show a blatant violation of the above applicable rule:

- The material in question is obviously privileged, and deals directly with the subject matter of this case;

- 1 • Plaintiff's disclosure of this material was inadvertent;
- 2 • Defense counsel obtained this material through the concerted effort of its expert;
- 3 • Defense counsel received, reviewed, and Bates-stamped the documents in
- 4 question;
- 5 • Defense counsel had this material in its possession for almost six months before
- 6 producing it as part of defendants' supplemental initial disclosures in the case;
- 7 • Defense counsel delayed producing this material until a protective order was in
- 8 place, even though the documents extracted from the laptop were clearly plaintiff's personal
- 9 information and not confidential to defendant; and
- 10 • Defense counsel failed to notify plaintiff's counsel at any time that it had
- 11 possession of this material – rather, plaintiff's counsel was forced to bring it to the attention of
- 12 defense counsel and to demand an explanation.

13 Moreover, there is substantial indirect evidence suggesting a more serious violation of
 14 the rule than the one admitted to by defense counsel in its correspondence on the subject:

- 15 • Defense counsel has given false and non-credible explanations for what
- 16 happened;
- 17 • Defense counsel does not deny that individuals at its law firm reviewed, studied
- 18 and analyzed the privileged documents, but have blocked all efforts to determine how the
- 19 documents were reviewed or used;
- 20 • Defense counsel gave plaintiff an incorrect address for its forensic computer
- 21 expert, who has since evaded service;
- 22 • Defendants have objected and invoked the privilege in response to plaintiff's
- 23 discovery on the subject (the Court may draw an adverse inference);
- 24 • Defense counsel used many of the documents recovered from the laptop (and
- 25 many in close Bates-numbered proximity to plaintiff's attorney-client communications) at
- 26 plaintiff's deposition; and
- 27 • Defendants have offered no remedial steps addressing the foregoing (other than a
- 28 promise not to look at the documents again).

1 **III. CONCLUSION**

2 For all the foregoing reasons, the Court should disqualify defense counsel from further
3 participation in this case. In the alternative, the Court should provide such other relief via
4 judicial intervention (including issue preclusion, entry of protective order(s) or other sanctions)
5 as this Court deems just.

6
7 DATED: April 26, 2010

PHILLIPS, ERLEWINE & GIVEN LLP

8
9 By: _____/S/_____
10 David M. Given
11 Attorneys for Plaintiffs
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PHILLIPS, ERLEWINE & GIVEN, LLP
50 California Street, 35th Floor
San Francisco, CA 94111
(415) 398-0900

DECLARATION OF NICHOLAS A. CARLIN

Nicholas A. Carlin declares:

1. I am a partner with Phillips, Erlewine & Given LLP, counsel for plaintiffs in this action. The matters stated in this declaration are based upon my personal knowledge.

2. This case was originally filed in the California Superior Court on May 8, 2009.

3. At or about that time, I received a request from defense counsel to plaintiff Michele Draper for return of certain information and property in connection with her employment by ADM. Ms. Draper thereafter complied with the request and voluntarily turned over various items, including a company laptop computer, to defendants. Attached hereto as Exhibit A is a true and correct copy of my May 13, 2009 letter to defense counsel on the subject. Shortly thereafter, defense counsel sent a messenger to my office to pickup the laptop, after which I heard nothing more on the subject.

4. Defendants made their initial disclosures on October 16, 2009. That disclosure consisted entirely of time records for the plaintiffs. It did not include any documents that were extracted from the laptop. Defendants made a supplemental disclosure of documents on November 9, 2009. This included the plaintiffs' personnel files, but again did not include any of the laptop documents.

5. Around this time period, the parties agreed to stipulate to a protective order for confidential documents. The Order was eventually signed and filed on or about December 14, 2009.

6. On December 17, 2009, we received from defendants a Supplemental Initial Disclosure production of over 14,000 pages of documents. This was three business days before Ms. Draper's deposition on December 22, 2009. The deposition proceeded before I had a chance to review these over 14,000 pages of documents in any detail. Most of the documents were emails and internal ADM documents, but they also included (although I did not realize it at this time) the documents extracted from Ms. Draper's laptop. These documents were not designated or organized in any way indicating their source as the laptop computer.

1 7. Following Ms. Draper's deposition (and the holiday season), I completed my
2 review of the December 17, 2009 document production. At that time I realized that documents
3 Bates-stamped "ADM 1940-2214" (275 pages) appeared to have been extracted by forensic
4 means from Ms. Draper's laptop. They each have a print date of "6/24/2009" and each one has
5 what appears to be a file name printed at the top right that I recognized as a file name generally
6 associated with cached web pages from internet browsing, for example
7 "file://c:/DOCUME~1/TSCHER~1/LOCALS~1/Temp/Temporary..." So, for example, if a user
8 happened to log into her web-based Yahoo! email account to read an email on the web page, the
9 computer would store that web page in one of these cached or "Temp" files.

10 8. The laptop documents consist of personal email correspondence through Ms.
11 Draper's Yahoo! email account, personal banking and financial data, personal travel information
12 and personal job search data. Many pages reflecting a Yahoo! email account caption are blank,
13 but these pages do not indicate whether content has been redacted or deleted from them.
14 Although these documents contain Ms. Draper's personal information, ADM has designated
15 these documents as "Confidential."

16 9. I also discovered that these documents included privileged communications
17 between my firm and Ms. Draper. These documents fall into two categories. The first category
18 consists of what appear to be screen shots of plaintiff's inbox from her personal email account at
19 Yahoo! These screen shots include on them emails from me with the date/time of the
20 correspondence together with the size of the file (indicating the size of the message and
21 attachment) as well as the subject lines (all of which refer to subjects relating to this case). The
22 second category consists of copies of four emails between me and plaintiff (one is a copy of an
23 email to another plaintiff in this case) on subjects directly related to this case – for example,
24 matters detailing issues like the drafting of the complaint (filed soon thereafter), calculation of
25 damages, the subject of meal breaks and employee shifts, and plaintiff's new employment.

26 10. To avoid publishing them in the public record of this case, my office created a
27 log of the foregoing documents. Attached hereto as Exhibit B is a true and correct copy of that
28

1 log. If the Court wishes, plaintiff can provide copies of the documents for the Court's *in camera*
2 review.

3 11. On February 16, 2010, I wrote a letter informing defense counsel of what I had
4 discovered and demanding "full disclosure" of the circumstances together with certain remedial
5 action. Attached hereto as Exhibit C is a true and correct copy of my February 16, 2010 letter
6 on the subject.

7 12. Attached hereto as Exhibit D is a true and correct copy of defense counsel's letter
8 to me of February 17, 2010.

9 13. Attached hereto as Exhibit E is a true and correct copy of my letter to defense
10 counsel of March 1, 2010.

11 14. Attached hereto as Exhibit F is a true and correct copy of defense counsel's letter
12 to me of March 3, 2010.

13 15. This correspondence was followed within a week by targeted discovery directed
14 to specific matters relating to the retrieval and use of these documents by defense counsel.
15 Attached hereto as Exhibit G are true and correct copies of defendant's responses to the
16 discovery directed to the foregoing subject.

17 16. I also issued a subpoena to the forensic expert identified by defense counsel,
18 returnable for an April 1, 2010 deposition together with a document production. Attached
19 hereto as Exhibit H is a true and correct copy of that subpoena.

20 17. The address given by defense counsel in his March 3, 2010 letter identifying the
21 forensic expert proved to be incorrect – although the expert is employed by the firm located
22 there (my office confirmed this via telephone), the process server was told that the individual did
23 not work at that location and the firm was unwilling to accept service. Another address for the
24 firm (acquired via a public records search) also proved fruitless. Attached hereto as Exhibit I is
25 a true and correct copy of a declaration of due diligence from our process server, together with
26 our office's public records search. We have since asked for defense counsel's cooperation in
27 accepting service of the subpoena and setting a date for the expert's deposition, but defense
28 counsel has failed thus far to do so.

18. Attached as Exhibit J is a true and correct copy of excerpts from Ms. Draper's deposition transcript. Defense counsel's questions from page 52, line 5 through page 53 line 13 reference information that is contained in laptop document ADM 2002. I am not aware of any other means by which defense counsel could have obtained this information apart from review of the laptop documents.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 26th day of April, 2010, at San Francisco, California.

EXHIBIT A

PHILLIPS, ERLEWINE & GIVEN LLP

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NICHOLAS A. CARLIN
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May 13, 2009

By Fax (949-851-0152) and US Mail

Todd B. Scherwin
Fischer & Phillips LLP
Suite 1000
2050 Main Street
Irvine, CA 92614

Re: Michele Draper

Dear Mr. Scherwin:

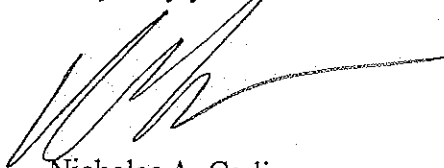
In response to your request, Ms. Draper has brought the ADM property you requested to my office: a laptop, one Baxa pump, a cell phone and power cord.

They are available for you to pick up from my office any time, just let us know in advance when you want to send someone to come by.

The allegations in your letter regarding misuse of ADM trade secrets and confidential information are entirely baseless. Any information that Ms. Draper has about the medical testing industry she already knew from her years in the industry before she joined ADM. She never signed any confidentiality or non-solicitation agreement with ADM and, in any event, as you are undoubtedly aware, she is free to compete with ADM pursuant to California Bus. & Prof. Code §16600 if she so chooses.

On the contrary, it is ADM that is liable to Ms. Draper and its other employees for unpaid overtime, meal and rest break premium pay, unreimbursed business expenses, and related claims, as well as for wrongful termination of Ms. Draper. You will be receiving our Complaint shortly (if you haven't already), and I would be happy to discuss a resolution of such claims with you when you are ready.

Very truly yours,



Nicholas A. Carlin

EXHIBIT B

LOG OF PRIVILEGED
DOCS PRODUCED BY ADM

<u>Bates No.</u>	<u>Document</u>	<u>From</u>	<u>To</u>	<u>Date</u>	<u>Subject/Info</u>
ADM01964	Yahoo! Mail screenshot	n/a	n/a	6/24/2009	One email from NAC on subject of case
ADM01974	Yahoo! Mail screenshot	n/a	n/a	6/24/2009	Two emails from NAC on subject of case
ADM01976	Yahoo! Mail screenshot	n/a	n/a	6/24/2009	Three emails from NAC on subject of case
ADM02077	Yahoo! Mail screenshot	n/a	n/a	6/24/2009	Four emails from NAC on subject of case
ADM02115	Yahoo! Mail screenshot	n/a	n/a	6/24/2009	Four emails from NAC on subject of case
ADM02117	Yahoo! Mail screenshot	n/a	n/a	6/24/2009	Three emails from NAC on subject of case
ADM02153	Yahoo! Mail screenshot	n/a	n/a	6/24/2009	One email from NAC on subject of case
ADM02170	Yahoo! Mail screenshot	n/a	n/a	6/24/2009	One email from NAC on subject of case
ADM02189	Yahoo! Mail screenshot	n/a	n/a	6/24/2009	Three emails from NAC on subject of case
ADM02205	Yahoo! Mail screenshot	n/a	n/a	6/24/2009	Three emails from NAC on subject of case
ADM02209	Yahoo! Mail screenshot	n/a	n/a	6/24/2009	Three emails from NAC on subject of case
ADM01994	Email from Yahoo! Mail	NAC	Draper	5/5/2009	Draft Complaint, Overtime Calculations
ADM02147	Email from Yahoo! Mail	Singleton	NAC	5/5/2009	Draft Complaint, Meal Breaks
ADM02148	Email from Yahoo! Mail	NAC	Draper	5/7/2009	Draft Complaint, Draper's new business
ADM02183	Email from Yahoo! Mail	Draper	NAC, Draper	5/7/2009	Forwarded message re: employee shifts

EXHIBIT C

PHILLIPS, ERLEWINE & GIVEN LLP

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NICHOLAS A. CARLIN
nac@phillaw.com

February 16, 2010

By Fax (949-851-0152) and US Mail

Todd B. Scherwin
Fischer & Phillips LLP
2050 Main Street, Suite 1000
Irvine, CA 92614

Re: Draper et al. v. American Diagnostic Medicine, Inc.

Dear Todd,

We regret having to write this letter, but we are deeply troubled that it appears that your firm has violated its ethical duties regarding receipt of attorney client privileged information.

Upon review of documents produced by ADM, we have just noticed that there are numerous printouts of web pages showing Ms. Draper's web based Yahoo email account inbox which reference emails to and from me. The subject lines of these emails are confidential attorney client communications in and of themselves in that they provide information about what Ms. Draper and I were discussing at various points in time. The specific document numbers are: ADM 1964, 1974, 1976, 2077, 2115, 2117, 2153, 2170, 2189, 2205, 2209.

Even worse, you have produced print outs of some of the actual emails: ADM 1994, 2147, 2148, 2183, each of which contains meaningful confidential content which could be used to ADM's unfair advantage in this lawsuit.

It is clear from the file names that these documents were taken off of Ms. Draper's company laptop hard drive. The laptop was returned to ADM at your request on June 2, 2009. We were not aware that it contained privileged material on it at the time since Ms. Draper did not knowingly save or store these emails on her laptop. They are from a web based Yahoo account, not an email client program resident on the computer. They were apparently stored in Temp files as copies of the Yahoo email account web pages she viewed from the laptop. It is apparent that you have used forensic methods to search through and recover these emails from the Temp files. Such disclosure was clearly inadvertent and does not constitute a waiver of the privilege. Federal Rule 502. It is equally clear that your actions in recovering these privileged documents were deliberate.

As you should be aware, the California Supreme Court has held in *Rico v. Mitsubishi Motors* (2007) 42 Cal.4th 807 that "When a lawyer who received material that obviously

appear to be subject to the attorney client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged." (Citing with approval *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, *emphasis added*).

You did not do so. Instead, since these documents were produced as part of ADM's initial disclosures, by definition, ADM has represented that it intends to use these documents in support of its defenses in this case.

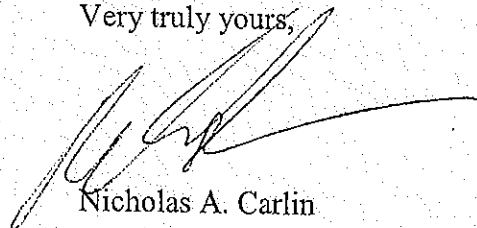
This is a very serious matter. Pursuant to *Rico* and Federal Rule 26(b)(5)(B), you are hereby instructed to immediately:

- sequester and destroy all copies, electronic and hard copy, of all such privileged communications;
- not use or disclose the information contained in such documents;
- provide full disclosure to us as to how you obtained such documents;
- provide full disclosure as to how such documents have been used by you thus far in this litigation (including in connection with preparation for Ms. Draper's deposition), including providing us with copies of all documents that refer in any way to such emails;
- advise us if you have reviewed any other such emails that have not been produced thus far;
- advise us if you have reviewed any attachments to these emails (which include such things as drafts of the complaint and fee agreements); and
- identify each person who has seen any of the privileged documents.

The foregoing is without prejudice to any other remedies we may pursue, including but not limited to disqualification.

We look forward to your anticipated cooperation.

Very truly yours,



Nicholas A. Carlin

EXHIBIT D

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ATTORNEYS AT LAW

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Writer's Direct Dial:
(949) 798-2181

Writer's E-mail:
tscherwin@laborlawyers.com

February 17, 2010

Via Facsimile and Mail

Nicholas A. Carlin, Esq.
PHILLIPS, ERLEWINE & GIVEN
50 California Street, 35th Floor
San Francisco, CA 94111

Re: *Michele Draper, et al. v. American Diagnostic Medicine*

Dear Mr. Carlin:

Thank you for your letter from February 16th regarding the document production and the potentially attorney-client privileged documents produced by my office. I appreciate you bringing this issue to my attention and wish I could have responded yesterday but I was out of the office at a deposition all day.

Please rest assured that my office has not knowingly reviewed any attorney-client privileged documents and does not wish to do so. In fact, upon receiving your letter, I did not review the documents outlined in your letter so that I could be sure that there was no issue with a violation of the privilege.

To give you a bit of background, which you are mostly aware of, upon being notified that Ms. Draper was still in possession of ADM's computer, you and I discussed the return of this computer. I believe a courier picked up the computer from your office in or around June, which my received then immediately turned over to a computer forensic expert. Items recovered from the computer were printed, bates labeled by my office's staff and produced with our initial disclosures in October. Our office never knowingly reviewed any attorney-client communication. Specifically, all documents related to ADM or Ms. Draper's employment were simply pulled off of the ADM issued laptop computer and produced with our initial disclosures.

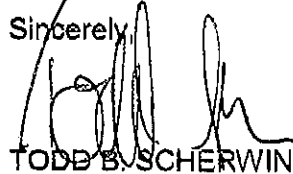
So that I can be sure which documents you are talking about and the extent of the apparent attorney-client privileged communication contained on them, I would like to set up a conference call with you tomorrow to discuss. Moreover, other than what was produced already, there are no further documents contained on the laptop computer that were recovered and withheld from production that pertained in any way to ADM. If my office had been aware that there was obvious attorney-client privileged documents we would have notified you immediately. I think that with the thousands of documents that were reviewed in the case, as you can attest, sometimes documents do not get reviewed as closely as they should be.

Nicholas A. Carlin, Esq.
February 17, 2010
Page 2

Lastly, I did not review, nor will I review, any of the documents listed in your letter in preparation for Ms. Draper's deposition nor any other depositions.

I look forward to your response so we can work through this issue.

Sincerely,



TODD B. SCHERWIN
For FISHER & PHILLIPS LLP

TBS:dmjw

cc: Timothy Murphy, Esq.

EXHIBIT E

PHILLIPS, ERLEWINE & GIVEN LLP

ATTORNEYS AT LAW
50 CALIFORNIA STREET, 35TH FLOOR
SAN FRANCISCO, CALIFORNIA 94111
TELEPHONE (415) 398-0900
FAX (415) 398-0911
WWW.PHILLAW.COM

NICHOLAS A. CARLIN
nac@phillaw.com

March 1, 2010

By Fax (949-851-0152) and US Mail

Todd B. Scherwin
Fischer & Phillips LLP
2050 Main Street, Suite 1000
Irvine, CA 92614

Re: Draper et al. v. American Diagnostic Medicine, Inc.

Dear Todd,

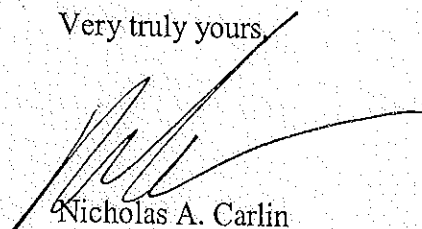
This will follow up on my letter regarding the privileged documents issue.

Upon further review, we continue to have serious concerns about this matter. You indicate in your letter of February 17, 2010 that the laptop documents were produced with ADM's initial disclosures in October 2009. In fact, they were not produced until December 16, 2009, received by us on December 17, just three business days before Ms. Draper's deposition on December 22, and at the height of the holiday season.

You indicate that thousands of documents were produced, but most of those are timesheets. The laptop documents only comprise some 300 documents, you have had them since June 2009, and it is clear from the deposition of Ms. Draper that at least some of these documents were used in preparation for the deposition.

Accordingly, in order to more fully evaluate this matter, we would appreciate it if you would provide us with more specifics about who actually extracted the laptop documents, who reviewed them and when, and any memos, emails or other documents discussing the laptop documents. Please also provide us with the laptop so may conduct our own forensic evaluation. In the absence of voluntary cooperation, we intend to exercise our rights under the federal rules.

Very truly yours,



Nicholas A. Carlin

EXHIBIT F

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

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(949) 851-0152 FaxWriter's Direct Dial:
(949) 798-2181Writer's E-mail:
tscherwin@laborlawyers.com

March 3, 2010

Via Facsimile and MailNicholas A. Carlin, Esq.
PHILLIPS, ERLEWINE & GIVEN
50 California Street, 35th Floor
San Francisco, CA 94111Re: *Michele Draper, et al. v. American Diagnostic Medicine*

Dear Mr. Carlin:

This letter is a response to your letter from March 1, 2010 and a follow-up to my letters from February 17th and February 22nd regarding the inadvertent disclosure of the potentially attorney-client privileged documents produced by my office that were recovered from ADM's laptop computer issued to Ms. Draper.

The documents produced by my office as part of our initial disclosures on December 16, 2009 included thousands of emails that were produced on a CD as well as contracts, and documents that were printed out from Ms. Draper's company issued laptop computer that your office had previously returned to my office.

By way of background, we first received the company issued laptop computer on June 4, 2010 from your office after we had demanded it back. Upon receipt of the laptop computer from your office, the laptop computer was picked up on June 5, 2010 by Talon Cyber Tec c/o Todd Stephan located at 151 Kalmus Drive Suite A-103, Costa Mesa, California 92626. Notably the computer was never opened or reviewed by my office before handing it over to Mr. Stephan. Mr. Stephan has been in possession of the computer since that time. Initial general spreadsheet data was produced to us on June 12, 2010 and preliminarily reviewed by me on June 15, 2010. Additionally data was provided to my office on June 23, 2009 and on June 26, 2009 all the documents were printed and placed in a folder. What was generally provided to my office (without us waiving attorney work product) were internet history logs, evidence of communication between Ms. Draper and current and former employees of ADM, job searches, and names of files that had been permanently deleted by the computer's user. Documents containing relevant information within search parameters (which did not include words that would be considered to trigger attorney-client communication) were all printed out by me and placed in my office's file folder. On November 24, 2009 we provided the stipulated protective order for your review so we could produce the roughly 14,000 emails that were sent from or received by your clients. On December 9, 2009 the protective order was finalized and sent to

Nicholas A. Carlin, Esq.
March 3, 2010
Page 2

Judge Walker for his signature and signed on December 15, 2009. Between December 1, 2009 and December 15, 2009 the 14,000+ emails were reviewed by Ms. Berenji so that we could produce them pursuant to Judge Walker's order and our promise to you to get all of those emails out to you once the protective order was signed. On December 16, 2009 Ms. Berenji produced the 14,000+ emails to you on a CD and also at that time had our office service staff label (ADM 1896-2214) the nuclear medicine agreements as well as the documents printed from the laptop that had been placed in the folder on June 26, 2009 to be produced in conjunction with the CD.

Moreover, no documents relating to any communications between Ms. Draper and you and/or any other attorney were reviewed in preparation for Ms. Draper's depositions. I can only assume that when you say that "some of these documents" were reviewed for Ms. Draper's deposition you are referring to documents relating to her job search and her job duties while at ADM which can in no way be considered privileged.

Additionally, we do not want to get into a debate regarding whether documents or emails contained on a company issued computer are private or privileged in any way in light of a company policy that states that an employee should have no expectation or privacy in using the internet or company property. We also would like to put this issue behind us and focus on the issues at hand in this matter and do not wish to maintain or review any documents that contain correspondence between you and your client(s). However, please understand that you must establish that documents are in fact privileged and provide the information to us on what we should do with the documents after we have had an opportunity to discuss with you the nature of the privilege.

As for the "printouts" you refer to in your letter from February 16th we are uncertain how print out screens of Ms. Draper's Yahoo based email account are privileged because they may show that she sent an email to you or your office. As you know, recovered from ADM's laptop computer that was issued to Ms. Draper were cached screen shots showing that Ms. Draper actively used her Yahoo email account on the laptop computer. Contained in these screen shots were the dates, author, and subject of certain emails that Ms. Draper sent after her employment with ADM ended. As such, none of this information appears to be privileged. Moreover, if my memory serves me correctly, these screen shots contained dozens of different emails many of which according to Mr. Stephan were not recoverable because they had not been opened on the computer. In other words there was no way of reading the emails or knowing what the emails were about just by looking at the cached screen shots.

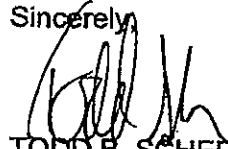
Lastly, if you wish to have a copy of the computer forensically reviewed, we can attempt to arrange that through Talon Cyber Tech through a supervised inspection demand.

//

Nicholas A. Carlin, Esq.
March 3, 2010
Page 3

I look forward to your response so we can work through this issue.

Sincerely,



TODD B. SCHERWIN
For FISHER & PHILLIPS LLP

TBS:dmjw

cc: Timothy Murphy, Esq.
Shadie Berenji, Esq.

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March 3, 2010

Sender's Direct Dial:
(949) 798-2181Sender's E-mail:
tscherwin@laborlawyers.com**FACSIMILE COVER PAGE**

SENT TO: Nicholas A. Carlin, Esq.

COMPANY: PHILLIPS, ERLEWINE & GIVEN

FAX NO.: (415) 398-0911 **PHONE NO.:** (415) 398-0900

SENT BY: Todd B. Scherwin, Esq.

RE: Michele Draper, et al. v. American Diagnostic Medicine

TOTAL PAGES:
(INCLUDING THIS COVER PAGE)

12

**Original will NOT follow by mail if this box
is checked ☐****SPECIAL INSTRUCTIONS**

Please see attached correspondence.

SECRETARY: Dorothy Mj. Wang
CLIENT/MATTER: 24062.0011

The information contained in this transmission is confidential. It is intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone collect, and return the original message to us at the above address via U.S. Mail. We will reimburse you for postage. Thank you.

EXHIBIT G

1 TIMOTHY J. MURPHY, Bar No. 54200
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 2 TODD B. SCHERWIN, Bar No. 239848
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 3 SHADIE L. BERENJI, Esq., Bar No. 235021
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 5 Irvine, California 92614
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7 Attorneys for Defendants
 AMERICAN DIAGNOSTIC MEDICINE, INC., SAM KANCHERLAPALLI,
 8 VICKY KANCHERLAPALLI and JANET HAUSENBAUER

9
 10 UNITED STATES DISTRICT COURT

11 FOR THE NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO
 12

13 MICHELE DRAPER, MERIWETHER
 LEWIS GARING, JR., JOHN VALENTON,
 14 ROBERT ERSKINE, FLORA YU,
 JONATHAN D. SINGLETON and QUINN
 15 RANSON,

Case No. C 09-02753 VRW

DEFENDANT AMERICAN DIAGNOSTIC
 MEDICINE, INC.'S RESPONSE TO
 PLAINTIFF LEWIS GARING, JR.'S
 INTERROGATORIES (SET ONE)

16
 17 Plaintiffs,

18 vs.

18 AMERICAN DIAGNOSTIC MEDICINE,
 INC., an Illinois Corporation, SAM
 19 KANCHERLAPALLI, VICKY
 KANCHERLAPALLI, JAN
 20 HAUSSENBAUER and DOES 4 through 50,

21 Defendants.
 22

23 PROPOUNDING PARTY: Plaintiff, LEWIS GARING, JR.

24 RESPONDING PARTY: Defendant, AMERICAN DIAGNOSTIC MEDICINE, INC.

25 SET NUMBER: ONE

26 Pursuant to California Rule 33 of the *Federal Rules of Civil Procedure*, Defendant
 27 AMERICAN DIAGNOSTIC MEDICINE, INC. ("Defendant") responds to Plaintiff LEWIS
 28 GARING, JR.'s first set of interrogatories (the "Interrogatories") as follows:

ADM's Response to Plaintiff Garing's Interrogatories (Set One)
 Case No. C 09-02753 VRW

RESPONSES TO SPECIAL INTERROGATORIES

SPECIAL INTERROGATORY NO. 1.

Provide all contact information for David Zamuda, including but not limited to home address, work/employer name and address, all telephone numbers and all email addresses.

RESPONSE TO SPECIAL INTERROGATORY NO. 1.

Objection. This interrogatory seeks to infringe upon the privacy rights of third parties. Specifically, this interrogatory calls for information contained in third party personnel files. Defendant, as the custodian of private information, has the duty to resist attempts at unauthorized disclosure and the person who is the subject of it is entitled to expect that his or her right will thus be asserted.

SPECIAL INTERROGATORY NO. 2.

Identify each and every individual (including but not limited to parties, ADM employees, attorneys, paralegals, experts, staff) who reviewed any documents (whether in paper or electronic form) which were recovered from Michele Draper's laptop (the "LAPTOP") at any time since she returned the LAPTOP to ADM after her termination.

RESPONSE TO SPECIAL INTERROGATORY NO. 2.

Objection. This interrogatory improperly seeks information protected by the attorney-client privilege and/or work product doctrine. Additionally, this interrogatory purports to require information which, at least in part, is neither relevant nor reasonably calculated to lead

to the discovery of admissible evidence. Moreover, this interrogatory is vague, ambiguous, and overbroad. Defendant is unable, without speculating, to determine what the terms "identify" "reviewed" and "recovered" as used herein are intended to mean. Moreover, this interrogatory is overbroad in scope, harassing, unduly burdensome and oppressive.

SPECIAL INTERROGATORY NO. 3.

Identify each and every individual (including but not limited to parties, ADM employees, attorneys, paralegals, experts, staff) with knowledge of the extraction of information from the LAPTOP.

//

RESPONSE TO SPECIAL INTERROGATORY NO. 3.

Objection. This interrogatory improperly seeks information protected by the attorney-client privilege and/or work product doctrine. Additionally, this interrogatory purports to require information which, at least in part, is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Moreover, this interrogatory is vague, ambiguous, and overbroad. Defendant is unable, without speculating, to determine what the terms "identify" "knowledge" and "extraction" as used herein are intended to mean. Moreover, this interrogatory is overbroad in scope, harassing, unduly burdensome and oppressive.

SPECIAL INTERROGATORY NO. 4.

Identify each and every individual (including but not limited to parties, ADM employees, attorneys, paralegals, experts, staff) with knowledge of the review of information extracted from the LAPTOP.

RESPONSE TO SPECIAL INTERROGATORY NO. 4.

Objection. This interrogatory improperly seeks information protected by the attorney-client privilege and/or work product doctrine. Additionally, this interrogatory purports to require information which, at least in part, is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Moreover, this interrogatory is vague, ambiguous, and overbroad. Defendant is unable, without speculating, to determine what the terms "identify" "knowledge of the review of information extracted" as used herein is intended to mean.

SPECIAL INTERROGATORY NO. 5.

Identify each and every individual from whom YOU have obtained a Written or recorded statement in connection with this case, and for each such statement, state when it was obtained.

RESPONSE TO SPECIAL INTERROGATORY NO. 5.

Objection. This interrogatory may seek information protected by the attorney-client privilege and/or work product doctrine. This interrogatory is also compound. Moreover, this interrogatory is vague, ambiguous, and overbroad. Defendant is unable, without speculating, to

1 determine what the terms "identify" and "written or recorded statement" as used herein are
2 intended to mean.

3 However, without waiving the foregoing objections, Defendant responds as follows:

4 No written or recorded statements have been obtained in connection with this case.

5 **SPECIAL INTERROGATORY NO. 6.**

6 If your insurance carrier has asserted a reservation of rights in connection with this case,
7 please describe in detail each and every stated ground for such reservation of rights.

8 **RESPONSE TO SPECIAL INTERROGATORY NO. 6.**

9 Objection. This interrogatory purports to require information which is neither relevant
10 nor reasonably calculated to lead to the discovery of admissible evidence. Moreover, this
11 interrogatory is vague, ambiguous, and overbroad. Defendant is unable, without speculating, to
12 determine what the term "describe in detail" as used herein is intended to mean. Finally, this
13 interrogatory improperly attempts to seek the contents of a reservation of rights letter in
14 violation of FRCP 26.

15
16 Date: April 7, 2010

FISHER & PHILLIPS LLP

17
18
19 By:

TIMOTHY J. MURPHY

TODD B. SCHERWIN

SHADIE L. BERENJI

Attorneys for Defendants

AMERICAN DIAGNOSTIC MEDICINE,

INC., SAM KANCHERLAPALLI,

VICKY KANCHERLAPALLI and

JANET HAUSENBAUER

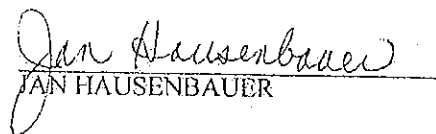
VERIFICATION

I, JAN HAUSENBAUER, declare as follows:

I am the Fixed Site Imaging Manager for AMERICAN DIAGNOSTIC MEDICINE, INC. and am authorized to make this verification on its behalf. I have read **DEFENDANT AMERICAN DIAGNOSTIC MEDICINE'S RESPONSES TO PLAINTIFF LEWIS GARING JR'S INTERROGATORIES, SET ONE** and know the contents thereof. To the extent I have personal knowledge of the matters set forth therein, the same are true and correct. Insofar as said matters are a composite of the information of many individuals, I do not have personal knowledge concerning all of the information contained in said responses but I am informed and believe that the information set forth therein for which I lack personal knowledge is true and correct.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 24th day of April, 2010 at Batavia, Illinois.


JAN HAUSENBAUER

CERTIFICATE OF SERVICE

I, the undersigned, am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; am employed with the law offices of Fisher & Phillips LLP and my business address is 2050 Main Street, Suite 1000, Irvine, California 92614.

On April 7, 2010, I served the foregoing document entitled **DEFENDANT AMERICAN DIAGNOSTIC MEDICINE, INC.'S RESPONSE TO PLAINTIFF LEWIS GARING, JR.'S INTERROGATORIES (SET ONE)**, on all the appearing and/or interested parties in this action by placing ☒ *the original* ☐ *a true copy* thereof enclosed in sealed envelope(s) addressed as follows:

SEE ATTACHED MAILING LIST

☒ **[by MAIL]** I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Irvine, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postage cancellation date or postage meter date is more than one day after date of deposit for mailing this affidavit.

☐ **[by PERSONAL SERVICE]** I caused to be delivered by messenger such envelope(s) by hand to the office of the addressee(s). Such messenger is over the age of eighteen years and not a party to the within action and employed with ASAP Corporate Services, Inc., whose business address is 17817 Gillette Avenue, Irvine, California 92614.

☒ **FEDERAL** - I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on April 7, 2010, at Irvine, California.

DOROTHY MJ. WANG
Print Name

By: 

Signature

MAILING LIST*Michele Draper, et al. v. ADM*

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Email: nac@phillaw.com
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50 California Street, 35th Floor
San Francisco, CA 94111
(415) 398-0900 Fax: (415) 398-0911

Attorney for Plaintiffs,
MICHELE DRAPER, MERIWETHER
LEWIS GARING, JR., JOHN VALENTON,
ROBERT ERSKINE, FLORA YU,
JONATHAN D. SINGLETON and
QUINN RANSON

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 2 TODD B. SCHERWIN, Bar No. 239848
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 3 SHADIE L. BERENJI, Esq., Bar No. 235021
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 Telephone (949) 851-2424
 6 Facsimile (949) 851-0152

7 Attorneys for Defendants
 AMERICAN DIAGNOSTIC MEDICINE, INC., SAM KANCHERLAPALLI,
 8 VICKY KANCHERLAPALLI and JANET HAUSENBAUER

9
 10 UNITED STATES DISTRICT COURT

11 FOR THE NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO
 12

13 MICHELE DRAPER, MERIWETHER
 LEWIS GARING, JR., JOHN VALENTON,
 14 ROBERT ERSKINE, FLORA YU,
 JONATHAN D. SINGLETON and QUINN
 15 RANSON,

Case No. C 09-02753 VRW

DEFENDANT AMERICAN DIAGNOSTIC
 MEDICINE, INC.'S RESPONSE TO
 PLAINTIFFS' REQUEST FOR
 PRODUCTION OF DOCUMENTS
 (SET THREE)

16 Plaintiffs,

17 vs.

18 AMERICAN DIAGNOSTIC MEDICINE,
 INC., an Illinois Corporation, SAM
 19 KANCHERLAPALLI, VICKY
 KANCHERLAPALLI, JAN
 20 HAUSSENBAUER and DOES 4 through 50,

21 Defendants.
 22

23 PROPOUNDING PARTY: ALL PLAINTIFFS

24 RESPONDING PARTY: Defendant, AMERICAN DIAGNOSTIC MEDICINE, INC.

25 SET NUMBER: THREE

26 Pursuant to Rule 34 of *Federal Rules of Civil Procedure*, Defendant AMERICAN
 27 DIAGNOSTIC MEDICINE, INC. ("Defendant") responds to Plaintiffs' third set of request for
 28 production of documents (the "Request") as follows:

ADM'S Response to Plaintiffs' Request for Production (Set Three)
 Case No. C 09-02753 VRW

REQUEST FOR PRODUCTION NO. 96:

The laptop computer used by Michele Draper when she was employed by ADM ("the LAPTOP").

RESPONSE TO REQUEST FOR PRODUCTION NO. 96:

Defendant has agreed to make the computer available for inspection by a computer forensic expert at a mutually agreeable date and time.

REQUEST FOR PRODUCTION NO. 97:

All DOCUMENTS which YOU have extracted from the LAPTOP since it was returned to ADM by Draper after her termination.

RESPONSE TO REQUEST FOR PRODUCTION NO. 97:

Objection. This request is harassing and improperly seeks documents and information protected by the attorney-client privilege and/or work product doctrine. Moreover, this interrogatory is vague, ambiguous, and overbroad. Defendant is unable, without speculating, to determine what the term "extracted" as used herein is intended to mean.

REQUEST FOR PRODUCTION NO. 98:

All DOCUMENTS which refer to, relate to or concern the extraction of DOCUMENTS from the LAPTOP, including but not limited to forensic expert reports, notes, memoranda, analyses, and emails.

RESPONSE TO REQUEST FOR PRODUCTION NO. 98:

Objection. This request is harassing and improperly seeks documents and information protected by the attorney-client privilege and/or work product doctrine. Moreover, this interrogatory is vague, ambiguous, and overbroad. Defendant is unable, without speculating, to determine what the terms "refer to" "relate to" "concern the extraction" "reports" "notes" "memoranda" "analyses" and "emails" as used herein are intended to mean.

REQUEST FOR PRODUCTION NO. 99:

All DOCUMENTS which refer to, relate to or concern the DOCUMENTS extracted from the LAPTOP, including but not limited to notes, memoranda, analyses, and emails.

//

RESPONSE TO REQUEST FOR PRODUCTION NO. 99:

Objection. This request is harassing and improperly seeks documents and information protected by the attorney-client privilege and/or work product doctrine. Moreover, this interrogatory is vague, ambiguous, and overbroad. Defendant is unable, without speculating, to determine what the terms "refer to" "relate to" "concern the DOCUMENTS extracted" "notes" "memoranda" "analyses" and "emails" as used herein are intended to mean.

REQUEST FOR PRODUCTION NO. 100:

All DOCUMENTS which refer to, relate to or concern review of the DOCUMENTS extracted from the LAPTOP, including but not limited to notes, memoranda, analyses, and emails.

RESPONSE TO REQUEST FOR PRODUCTION NO. 100:

Objection. This request is harassing and improperly seeks documents and information protected by the attorney-client privilege and/or work product doctrine. Moreover, this interrogatory is vague, ambiguous, and overbroad. Defendant is unable, without speculating, to determine what the terms "refer to" "relate to" "concern review of the DOCUMENTS extracted" "notes" "memoranda" "analyses" and "emails" as used herein are intended to mean.

REQUEST FOR PRODUCTION NO. 101

All DOCUMENTS which refer to, relate to or concern the existence of privileged documents on the LAPTOP.

RESPONSE TO REQUEST FOR PRODUCTION NO. 101

Objection. This request is harassing and improperly seeks documents and information protected by the attorney-client privilege and/or work product doctrine. Moreover, this interrogatory is vague, ambiguous, and overbroad. Defendant is unable, without speculating, to determine what the terms "refer to" "relate to" and "concern the existence of privileged documents" as used herein are intended to mean.

REQUEST FOR PRODUCTION NO. 102

All witness statements pertaining in any way to this case, whether written or recorded.

RESPONSE TO REQUEST FOR PRODUCTION NO. 102

Objection. This request may seek documents and information protected by the attorney-client privilege and/or work product doctrine. Moreover, this interrogatory is vague, ambiguous, and overbroad. Defendant is unable, without speculating, to determine what the term "witness statements" as used herein is intended to mean.

Without waiving the foregoing objections, Defendant responds as follows:

After a diligent search and reasonable inquiry, Defendant is unable to respond to this request as it has no such documents in its possession, custody, or control.

REQUEST FOR PRODUCTION NO. 103

All DOCUMENTS which refer to, relate to or concern any complaints made to YOU by any third party (including but not limited to customers) about Michele Draper's job performance.

RESPONSE TO REQUEST FOR PRODUCTION NO. 103

Objection. This request may seek documents and information protected by the attorney-client privilege and/or work product doctrine. Moreover, this interrogatory is vague, ambiguous, and overbroad. Defendant is unable, without speculating, to determine what the terms "refer to" "relate to" and "concern any complaints"

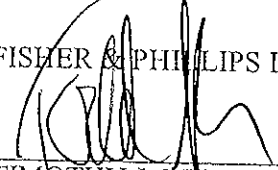
Without waiving the foregoing objections, Defendant responds as follows:

After a diligent search and reasonable inquiry, Defendant has produced all non-privileged documents which are believed to be responsive to this request and are in its possession, custody, or control.

Date: April 7, 2010

FISHER & PHILLIPS LLP

By:


TIMOTHY J. MURPHY
TODD B. SCHERWIN
SHADIE L. BERENJI
Attorneys for Defendants
AMERICAN DIAGNOSTIC MEDICINE,
INC., SAM KANCHERLAPALLI,
VICKY KANCHERLAPALLI and
JANET HAUSENBAUER

CERTIFICATE OF SERVICE

I, the undersigned, am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; am employed with the law offices of Fisher & Phillips LLP and my business address is 2050 Main Street, Suite 1000, Irvine, California 92614.

On April 7, 2010, I served the foregoing document entitled **DEFENDANT AMERICAN DIAGNOSTIC MEDICINE, INC.'S RESPONSE TO PLAINTIFFS' REQUEST FOR PRODUCTION OF DOCUMENTS (SET THREE)**, on all the appearing and/or interested parties in this action by placing ☒ *the original* ☐ *a true copy* thereof enclosed in sealed envelope(s) addressed as follows:

SEE ATTACHED MAILING LIST

☒ **[by MAIL]** I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Irvine, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postage cancellation date or postage meter date is more than one day after date of deposit for mailing this affidavit.

☐ **[by PERSONAL SERVICE]** I caused to be delivered by messenger such envelope(s) by hand to the office of the addressee(s). Such messenger is over the age of eighteen years and not a party to the within action and employed with ASAP Corporate Services, Inc., whose business address is 17817 Gillette Avenue, Irvine, California 92614.

☒ **FEDERAL** - I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on April 7, 2010, at Irvine, California.

DOROTHY MJ. WANG
Print Name

By:

Signature

CERTIFICATE OF SERVICE

MAILING LIST
Michele Draper, et al. v. ADM

Nicholas A. Carlin, Esq.
Email: nac@phillaw.com
PHILLIPS, ERLEWINE & GIVEN
50 California Street, 35th Floor
San Francisco, CA 94111
(415) 398-0900 Fax: (415) 398-0911

Attorney for Plaintiffs,
MICHELE DRAPER, MERIWETHER
LEWIS GARING, JR., JOHN VALENTON,
ROBERT ERSKINE, FLORA YU,
JONATHAN D. SINGLETON and
QUINN RANSON

EXHIBIT H

AO 88A (Rev. 01/09) Subpoena to Testify at a Deposition or to Produce Documents in a Civil Action

UNITED STATES DISTRICT COURT

for the

NORTHERN DISTRICT OF CALIFORNIA

MICHELE DRAPER, et al.

Plaintiff

v.

AMERICAN DIAGNOSTIC MEDICINE, INC., an
Illinois Corporation, et al.

Defendant

Civil Action No. C 09-02753 (VRW)

(If the action is pending in another district, state where:

SUBPOENA TO TESTIFY AT A DEPOSITION
OR TO PRODUCE DOCUMENTS IN A CIVIL ACTION

TODD STEPHAN, c/o Talon Cyber, 151 Kalmus Drive, Suite A-103, Costa Mesa, CA 92626

☒ **Testimony:** YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization that is *not* a party in this case, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Place: Sheppard, Mullin, Richter & Hampton, LLC, 1901

Avenue of the Stars, Ste. 1600, Los Angeles, CA 90067

Date and Time:

Apr. 1, 2010; 10:00 a.m.

The deposition will be recorded by this method: stenographically

☒ **Production:** You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material: That certain laptop used by plaintiff Michele Draper during her employment by ADM; all documents referring or relating to the laptop; all documents referring or relating to data extracted from that laptop; all communications referring or relating to any of the above.

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: _____

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk_____
Attorney's signature

The name, address, e-mail, and telephone number of the attorney representing (name of party) plaintiffs, who issues or requests this subpoena, are:

Nicholas A. Carlin, Phillips, Erlewine & Given LLP, 50 California Street, 35th Floor, San Francisco, CA 94111 (415) 398-0900

EXHIBIT I

Attorney or Party without Attorney: NICHOLAS A. CARLIN, ESQ. PHILLIPS, ERLEWINE & GIVEN LLP 50 CALIFORNIA STREET 35TH FLOOR SAN FRANCISCO, CA 94111 Telephone No: (415) 398-0900				For Court Use Only	
Ref. No or File No.: 8394.1					
Insert name of Court, and Judicial District and Branch Court: United States District Court For The Northern District Of California					
Plaintiff: MICHELE DRAPER Defendant: AMERICAN DIAGNOSTIC MEDICINE, INC..					
NON SERVICE/RETURN		Hearing Date: Thu, Apr. 01, 2010	Time: 10:00am	Dept/Div:	Case Number: C 09-02753 (VRW)

1. I, FRANK HARRIGAN, and any employee or independent contractors retained by NATIONWIDE LEGAL, INC. are and were on the dates mentioned herein over the age of eighteen years and not a party to this action. Personal service was attempted on Defendant TODD STEPHAN, c/o TALON CYBER, 151 Kalmus Drive, Suite A-103, Costa Mesa, CA 92626 as follows:
2. *Documents:* SUBPOENA TO TESTIFY AT A DEPOSITION OR TO PRODUCE DOCUMENTS IN A CIVIL ACTION (Commanded to Appear and Produce)..

Day	Date	Time	Location	Results
Thu	03/18/10	3:00pm	Business	1. ADDRESS: 151 KALMUS DRIVE SUITE A-103, COSTA MESA CA 92626: PER 'BARRY', SUBJECT NOT IN AND STATED THAT SUBJECT DOES NOT WORK ON THIS LOCATION. 'BARRY' CALLED SUBJECT ON HIS CELL PHONE AND PER SUBJECT, HE WOULD NOT ACCEPT THE DOCUMENTS. GIVEN ADDRESS IS A VERY SECURE BUILDING WITH ARMED SECURITY GUARDS, NEED TO GET BUZZED IN TO GAIN ENTRY. Attempt made by: FRANK HARRIGAN.
Wed	03/24/10	4:28pm		NEW ADDRESS PROVIDED PER CLIENT.
Mon	03/29/10	2:00pm	Business	2. ADDRESS: 17195 NEWHOPE ST. SUITE 207, FOUNTAIN VALLEY CA 92018: GIVEN ADDRESS IS "NEW HORIZON LAW GROUP", OFFICE CLOSED. Attempt made by: FRANK HARRIGAN.
Tue	03/30/10	11:30am	Business	DOOR LOCKED. AFTER THE SERVER BANGED ON THE DOOR A YOUNG MAN ANSWERED AND SAID THAT SUBJECT MOVED OUT 2 YEARS AGO. Attempt made by: FRANK HARRIGAN.
Tue	04/13/10	4:17pm		CANCEL AFTER NON-SERVICE.

3. *Person Executing*

- a. FRANK HARRIGAN
 b. NATIONWIDE LEGAL, INC.
 820 NORTH PARTON STREET
 SUITE 203
 SANTA ANA, CA 92701
 c. (714) 558-2400

Recoverable Costs Per CCP 1033.5(a)(4)(B)

d. *The Fee for service was:*

- e. *I am:* (3) registered California process server
 (i) Independent Contractor
 (ii) Registration No.: 1530
 (iii) County: Orange

4. *I declare under penalty of perjury under the laws of the State of California and under the laws of the United States Of America that the foregoing is true and correct.*

Date: Fri, Apr. 16, 2010

NON SERVICE/RETURN

(FRANK HARRIGAN)240605.nicar.123869

Business Entity Detail

Data is updated weekly and is current as of Friday, April 16, 2010. It is not a complete or certified record of the entity.

Entity Name:	TALON CYBER TEC, LLC
Entity Number:	200513910205
Date Filed:	05/16/2005
Status:	ACTIVE
Jurisdiction:	CALIFORNIA
Entity Address:	17195 NEWHOPE ST STE 207
Entity City, State, Zip:	FOUNTAIN VALLEY CA 92708
Agent for Service of Process:	RONALD WILLIAMS
Agent Address:	17195 NEWHOPE ST, STE 207
Agent City, State, Zip:	FOUNTAIN VALLEY CA 92708

* Indicates the information is not contained in the California Secretary of State's database.

* **Note:** If the agent for service of process is a corporation, the address of the agent may be requested by ordering a status report.

- For information on checking or reserving a name, refer to [Name Availability](#).
- For information on ordering certificates, copies of documents and/or status reports or to request a more extensive search, refer to [Information Requests](#).
- For help with searching an entity name, refer to [Search Tips](#).
- For descriptions of the various fields and status types, refer to [Field Descriptions and Status Definitions](#).

EXHIBIT J

MICHELE DRAPER - DECEMBER 22, 2009

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MICHELE DRAPER, MERIWETHER)
LEW GARING, JR., JOHN)
VALENTON, ROBERT ERSKINE,)
FLORA YU, JONATHAN D.)
SINGLETON, and QUINN RANSON,)
Plaintiffs,)

vs.)

Case No.: C 09-02753 (VRW)

VOLUME I

Pages 1 to 270

AMERICAN DIAGNOSTIC)
MEDICINE, INC., an Illinois)
Corporation, SAM)
KANCHERLAPALLI, VICKY)
KANCHERLAPALLI, JAN)
HAUSENBAUER, and DOES 4)
through 50,)
Defendants.)

VIDEOTAPED DEPOSITION OF MICHELE DRAPER
Tuesday, December 22, 2009

Reported by:

HEIDI BELTON, CSR #12885, RPR

COPY

JAN BROWN & ASSOCIATES
NATIONWIDE DEPOSITION & VIDEOGRAPHY SERVICES
701 Battery Street, 3rd Floor, San Francisco, CA 94111
(415) 981-3498

MICHELE DRAPER - DECEMBER 22, 2009

1 Q. And you don't have any estimate or best
2 recollection as to how you described your job duties at
3 ADM when you applied for those jobs?

4 A. No, I do not.

5 Q. Did you tell anybody subsequent to your
6 employment at ADM that as an employee of ADM you
7 supervised more than 10 people?

8 A. To the best of my knowledge I don't remember.

9 Q. After your employment with ADM ended, did you
10 ever tell anybody that you managed and supervised six
11 mobile vans?

12 A. I don't remember, to the best of my knowledge.

13 Q. After your employment with ADM ended, did you
14 ever write to anybody that you managed and supervised
15 six mobile vans?

16 A. I don't remember, to the best of my knowledge.

17 Q. After your employment at ADM ended, did you
18 ever tell anybody or write that you managed and
19 supervised two fixed sites as an employee of ADM?

20 A. I don't remember, to the best of my knowledge.

21 Q. Okay. As an employee -- as an employee of
22 ADM, did you supervise any employees?

23 A. No, I did not.

24 Q. When applied for jobs, assuming you did after
25 your employment with ADM ended, what did you say was the

MICHELE DRAPER - DECEMBER 22, 2009

1 reason for your reason -- your reason for leaving ADM?
2 strike that. Let me repeat that.

3 After your employment with ADM ended, what did
4 you say was the reason that your employment with ADM
5 ended?

6 A. I don't remember.

7 Q. Why did your employment with ADM end?

8 A. I don't know.

9 Q. Were you terminated?

10 A. Yes, I was.

11 Q. Was it a mutual agreement to leave your
12 employment with ADM?

13 A. No, it was not.

14 Q. What is IDTS?

15 MR. CARLIN: I'm going to object. Relevance.
16 Privacy. Instruct not to answer.

17 BY MR. SCHERWIN:

18 Q. Are you going to follow your counsel's
19 instruction?

20 A. Yes, I am.

21 MR. SCHERWIN: Nick, that's a foundational
22 question. I need to lay the foundation because there's
23 certainly relevant questions that need to be asked
24 regarding what ITDS is. So objecting to a basic
25 question like that completely impedes my ability to take